***Homes for England v Nick Selman (Holdings) Limited and Bromham Road Development LLP* [2020] EWHC 936 (Ch)**

Homes for England and Nick Selman (Holdings) Limited were equal members in an LLP. Homes alleged that Holdings had breached the duties of honesty and good faith which it owed to Homes, by delaying in executing refinancing documentation in relation to a loan from a finance company to the LLP. This resulted in an increase in the redemption amount payable by the LLP, and thus a decrease in the amount the LLP could afford to repay Homes in respect of a loan it had made to the LLP. The trial judge exercised his discretion to permit Homes to bring a derivative claim on behalf of the LLP, applying the criteria in s263 of the Companies Act 2006 (CA 2006) for the exercise of that discretion.

Holdings appealed on the ground that s263 did not apply to LLPs, and under the common law test which applied instead the judge should have declined to grant permission. The court held that s263 did not apply. The Court of Appeal in *Harris v Microfusion 2003-2 LLP* [2016] EWCA Civ 1212 had held that it was common ground that ss260-264 CA 2006 on derivative actions did not apply to LLPs because the Limited Liability Partnerships (Application of Companies Act 2006) Regulations 2009 did not apply those provisions to LLPs. Although Homes argued that s263 was applied by the Civil Procedure Rules 1998 (CPR) Rule 19.9C, the court rejected this argument on a number of grounds. First, CPR 19.9C only applied 'the procedure…under sections 261. 262 or 264'. The omission of s263 appeared to be deliberate, and this was supported by the fact that the CPR dealt with procedure whereas s263 was substantive, and that s260, which was also substantive, had also been omitted. Further, whereas the form to be used for a company (annexed to the practice direction at CPR 19 CPD.9) stated that the court must take account of the s263 criteria, the form for an LLP did not. This conclusion was also supported by Whittaker and Machell, *The Law Of Limited Liability Partnerships*, at para 14-41. Second, although CPR Rule 19.C did apply s261, the broad discretion given to the court by s261(4) concerned the terms upon which a claim was to continue if it was given permission, and not the basis on which the court was to determine whether to give permission in the first place. Section 261(4) therefore did not enable the court to apply the s263 criteria to the giving of permission.

The court further held that the common law test for permission to bring a derivative claim was not satisfied. In order to bring a derivative claim, it was necessary to show that one of the four established exceptions to the rule in *Foss v Harbottle* (1843) 2 Hare 461 applied. Only the fourth exception was relevant here, and its scope was set out in *Aboureya v Sigmund* [2014] EWHC 277 (Ch) in a passage approved in *Harris v Microfusion*. It required that Holdings' actions to have caused financial loss to the members, albeit normally of a reflective character, and that either fraud in the sense of deliberate and dishonest breach of duty had been pleaded or it was alleged that Holdings had acquired a personal benefit at the expense of the LLP. The court accepted the increased amount payable on the refinanced loan was a loss to the LLP which would also be suffered reflectively by the members. However, there was no allegation of dishonest breach of duty, and the allegation that the delay had put Homes under pressure in relation to an ongoing negotiation regarding a

dissolution of the LLP was fell short of the type of benefit required on the authority of *Aboureya*, *Daniels v Daniels* [1978] Ch 406 and *Harris*.

***Investec Asset Finance plc and Investec Bank plc v Commissioners of HMRC* [2020] EWCA Civ 579**

Two companies that were in partnership together disputed closure notices issued by HRMC as to their tax liability. Sections 111 and 114 of the Income and Corporation Tax Act 1988 (ICTA) provided that where a company's business included owning interests in partnerships, the partnership profits were first calculated for the purposes of corporation tax as if the partnership were a company, and were then taxed in the hands of the corporate partner according to its proportionate interests in the partnership. The partner also remained liable for corporation tax on the profits of its non-partnership trade under s42 of the Finance Act 1998.

Here, the companies had incurred costs both in relation to acquiring their interests in the partnerships and making subsequent capital contributions to the partnerships which they sought to deduct from tax. The First Tier Tribunal (FTT) and the Upper Tribunal (UT) had held that both were revenue expenditure rather than capital expenditure, and hence capable, in principle, of being deductible. The UT had also held that the acquisition costs were incurred wholly and exclusively for the purposes of the companies' non-partnership trades and were therefore tax deductible. HMRC did not challenge these findings.

The court held first that the capital contributions were not deductible as an expense from the profits of the companies' non-partnership trades, because they were not wholly and exclusively incurred for the purposes of those trades as required by s74 ICTA. The test was whether they were incurred for the purposes of the trade, not whether they were incurred for the purposes of the taxpayer (*Mallalieu v Drummond* [1983] AC 861 and *Vodafone Cellular Ltd v Shaw* [1997] STC 734). Here the contributions were paid to the partnerships and then used by them for their purposes to acquire assets; and the fact that the corporate partners had not invested directly in those assets themselves was an essential part of their overall tax planning.

However, the court also held that the partnership profits which had been taxed already in the hands of the corporate partners pursuant to s114 ICTA should be left out of account when calculating the profit of the companies' non-partnership trades, in order to comply with the principle that the same profits should not be taxed as income twice.

Finally, the court accepted that HMRC could defend a challenge brought by a taxpayer against a closure notice by relying on arguments that the proper tax treatment of the company should be something different from the conclusions set out in the closure notice. The FTT was the appropriate stage at which to determine the scope of 'the matter in question' under s49G(4) of the Taxes Management Act 1970, which was defined in s49I(1)(a) as 'the matter which an appeal relates'. Para 34(3) of Schedule 18 Finance Act 1998 allowed a company to appeal against an amendment to its return, and this

amendment was therefore the relevant matter. However, if the FTT determined that the context of the closure notice and the surrounding circumstances demonstrated that the subject matter was broader than the particular conclusion and adjustments addressed in the closure notice, it was open to HMRC to put forward different arguments, even if they resulted in a greater tax liability than that claimed in the closure notice, provided that they dealt with the same matters in question identified in the closure notice. This did not create an unfair imbalance between its interests and those of the taxpayer because the overall scheme of taxation still included taxpayer protections and narrowing the scope of the appeal was not intended to be an additional protection.

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